OCBC Bank (M) Bhd v Kredin Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-642 OF 1995
NH CHAN, SITI NORMA YAAKOB AND ABDUL MALEK AHMAD JJCA
23 APRIL 1997

Civil Procedure *— Res judicata — Separate actions to set aside order for sale — Actions raised same basic remedy — Issue could have been raised in earlier proceedings — Whether doctrine of res judicata applied — Rules of the High Court 1980 O 18 r 19*

Land Law *— Sale of land — Order for — Application to set aside order — Whether hearing of application for order for sale was proper forum to raise issue on interest payable — Whether application was barred by res judicata*

The appellant as lender had executed a loan agreement with the respondent granting the latter a loan which was secured by a charge over a few pieces of land ('the charged properties'). Upon the default of the respondent on the loan, the appellant commenced an action against the respondent and two guarantors ('the first action'). Subsequently, a charge action to have the charged properties sold by public auction ('the second action') was initiated and an order for sale of the charged properties was granted. The respondent appealed to the Supreme Court but subsequently withdrew its appeal. Later, the respondent filed a civil action against the appellant ('the third action') to set aside the order for sale ganted in the second action. However, the third action was subsequently set aside.

The respondent then filed another action in the High Court ('the fourth action') to set aside the order for sale on the ground that the liability for interest imposed by it was not sanctioned by the charge agreement. Accordingly, the appellant applied to strike out the fourth action under O 18 r 19 of the Rules of the High Court 1980 or under its inherent jurisdiction. The appellant's application was dismissed. The appellant appealed and pleaded res judicata.

Held, allowing the appeal:

The proper forum for the respondent to raise the issue on interest payable was before the judge who granted the order for sale in the second action. This the respondent did not do.

The respondent also had the opportunity to do the same at the appeal level; instead it withdrew the appeal, depriving itself of its right to raise the same point. Again, in the third action, it did not raise this although the prayer was to set aside the order for sale as in the fourth action albeit on different grounds.

The doctrine of res judicata would apply here as both the third and fourth actions sought the same basic remedy and the respondent should have raised the issue in the third action and not in the fourth action as was the case here.

Hence the respondent should be shut out from raising in a subsequent action an issue which it could, and should, have raised in earlier proceedings. In any case, the respondent could still sue the appellant direct without having to set aside the order for sale (see pp 553D–F, H–I and 554G); *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 and *Brisbane City Council & Anor v A-G for Queensland* [1979] AC 411 followed.

[Bahasa Malaysia summary

Perayu sebagai pemberi pinjaman telah melaksanakan suatu perjanjian pinjaman dengan penentang yang memberikan penentang pinjaman yang dijamin oleh gadaian atas beberapa bidang tanah ('harta yang digadai'). Apabila penentang ingkar atas pinjaman itu, perayu memulakan tindakan terhadap penentang dan dua penggerenti ('tindakan pertama'). Ekoran itu, suatu tindakan gadaian bagi membolehkan harta yang digadai dijual melalui lelong awam ('tindakan kedua') dimulakan dan satu perintah jualan ke atas harta yang digadai diberikan. Penentang merayu kepada Mahkamah Agung tetapi kemudiannya menarik balik rayuannya. Selepas itu, penentang memfailkan suatu tindakan sivil terhadap perayu ('tindakan ketiga') bagi mengetepikan perintah jualan yang diberikan dalam tindakan kedua. Namun demikian, tindakan ketiga kemudiannya diketepikan.

Penentang kemudiannya memfailkan tindakan lain di Mahkamah Tinggi ('tindakan keempat') bagi mengetepikan perintah jualan atas alasan bahawa liabiliti untuk faedah yang dikenakan ke atasnya tidak dibenarkan oleh perjanjian gadaian. Lantaran itu, perayu membuat permohonan untuk membatalkan tindakan keempat di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 atau di bawah bidang kuasa sedia ada. Permohonan perayu ditolak. Perayu membuat rayuan dan memplidkan res judicata.

Diputuskan, membenarkan rayuan:

Forum yang wajar bagi penentang menimbulkan isu tentang faedah yang harus dibayar adalah di hadapan hakim yang memberikan perintah jualan dalam tindakan kedua. Ini tidak dilakukan oleh penentang.

Penentang juga berpeluang untuk berbuat demikian di tahap rayuan; sebaliknya ia menarik balik rayuan, justeru itu melucutkan haknya untuk menimbulkan hujah yang sama. Sekali lagi, dalam tindakan ketiga, ia tidak menimbulkan perkara ini walaupun permohonan adalah untuk mengetepikan perintah jualan seperti dalam tindakan keempat meskipun atas alasan yang berbeza.

Doktrin res judicata terpakai di sini kerana kedua-dua tindakan ketiga dan keempat menghendaki remedi asas yang sama dan penentang sepatutnya telah menimbulkan isu itu dalam tindakan ketiga dan bukannya dalam tindakan keempat seperti dalam kes ini.

Maka penentang harus dihalang daripada menimbulkan dalam tindakan yang berturut suatu isu yang ia boleh, dan sepatutnya telah, timbulkan dalam prosiding yang lebih awal. Walau bagaimanapun, penentang masih boleh mendakwa perayu secara terus tanpa keperluan untuk mengetepikan perintah jualan (lihat ms 553D–F, H–I dan 554G); *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 dan *Brisbane City Council & Anor v A-G for Queensland* [1979] AC 411 diikut.]

Notes

For cases on res judicata, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2892–2939.

For cases on res judicata, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2605–2670.

Cases referred to

Brisbane City Council & Anor v A-G for Queensland [1978] 3 All ER 30; [1979] AC 411 (folld)

C (A Minor) v Hackney London Borough Council [1996] 1 WLR 789 (refd)

Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119 (refd)

Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105 (refd)

Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105 (refd)

Low Lee Lian v Ban Hin Lee Bank [1977] 1 MLJ 77 (refd)

Richland Trade & Development Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1996] 4 MLJ 233 (refd)

Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494 (folld)

Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor [1975] AC 581 (refd)

Legislation referred to

National Land Code 1965 s 257(1)(c)

Rules of the High Court 1980 O 18 r 19

Appeal from: Suit No S3–22–583–1992 (High Court, Kuala Lumpur)

Porres Royan (*John Mathew* with him) (*Shook Lin & Bok*) for the appellant.

KS Narayanan (*Saranjit Singh* with him) (*Jayaraman Ong & Co*) for the respondent.

Abdul Malek Ahmad JCA (delivering the judgment of the court): The doctrine of res judicata has been expounded in many an authority but, like other legal doctrines, continues to be argued before the courts as each case must depend on its particular facts. In this appeal before us, despite a well reasoned judgment, we could not, having carefully considered the arguments

A canvassed before us, agree with the learned trial judge who held that the doctrine was not applicable. We, therefore, allow the appeal with costs here and below and order that the deposit be refunded to the appellant.

The sequence of events are not exactly in dispute. On 22 June 1982, the appellant as lender had executed a loan agreement with the respondent B granting the latter a RM14.45m loan which loan facility was secured by a charge over five pieces of land ('the charged properties') dated 31 May 1982. The respondent had defaulted on the loan whereupon the appellant had commenced an action in 1986 vide Kuala Lumpur High Court Civil Suit No C23–948–86 ('the first action') against the respondent and the two guarantors.

C A charge action was initiated on 25 April 1986 vide Kuala Lumpur High Court Originating Summons No 31–1069–86 ('the second action') asking that the charged properties be sold by public auction under the National Land Code 1965 to satisfy the sum of RM19,807,584.93 due to the appellant as at 31 December 1985 together with interest thereon at the D rate of 14.75% per annum from 1 January 1986 to the date of payment and the usual consequential orders.

The order for sale was accordingly granted by NH Chan J (as he then was) on 16 July 1987 and the auction date was fixed on 14 March 1988. The respondent had appealed to the Supreme Court against that order but E withdrew it on the hearing date, namely, 7 March 1988 whereupon that appeal was dismissed with costs.

As for the first action, the appellant obtained an Order 14 judgment from the senior assistant registrar on 26 September 1988 which categorically states that the respondent and one of the two guarantors are to pay RM19,807,584.93 to the appellant with interest at the rate of 14.75% F from 1 January 1986 to the date of full payment. The appeal against that order was dismissed with costs by Zakaria J (as he then was) on 10 July 1989.

In April 1990, the respondent filed a civil action against the appellant vide Kuala Lumpur High Court Civil Suit No D3–22–1288–90 ('the third G action') where the statement of claim ran into 24 pages. The prayers sought were:

(a) to set aside the order for sale in the second action;

(b) to consolidate this action, the second action and two other actions involving the same parties (Kuala Lumpur High Court Civil Suit H No S3–23–62–88 and Kuala Lumpur High Court Civil Suit No S3–22–1125–92) which are to be heard subsequently as one matter;

(c) to restrain the appellant from disposing, interfering and/or attempting to dispose of by auction, sale or otherwise howsoever through its agents, solicitors, servants or whomsoever the charged properties;

I (d) to delete and cancel the charge over the charged properties at the direction of the court by the Registrar of Land Titles and to deposit the original documents of titles with the court until determination of the issue of damages and if the said damages so held by the court exceed the alleged claim of the appellant, the said damages are to be

affected towards the alleged claim and the titles to the charged properties are to be returned to the respondent; A

(e) to reinstate the approved status of the said charged properties as a whole assembly and all documents where necessary to be executed by the senior assistant registrar on behalf of the appellant to enable them to be valued and proceed as a whole block to the developer; B

(f) for all necessary interim orders and directions necessary to give effect;

(g) damages on a punitive, remedial, restorative and exemplary basis;

(h) interest;

(i) costs; and C

(j) any other relief.

The appellant applied to set aside the third action and this was granted by the court, after an inter partes hearing, on 25 June 1992. It is pertinent to point out that the relevant order states that the affidavits in two other D actions, namely the first action and Kuala Lumpur High Court Civil Suit No S6–23–62–88 had also been taken into consideration. The order had also ordered costs against the respondent apart from dismissing two injunctions granted on 18 September 1990 and 15 April 1992 respectively for which the respondent was ordered to pay damages to be assessed by the senior assistant registrar to the appellant. The oral application for stay had E been dismissed with costs.

The respondent then filed High Court Civil Suit No S3–22–583–92 ('the fourth action') in August 1992. Essentially, the fourth action again sought to set aside the order for sale. The appellant accordingly had applied to strike out the fourth action under O 18 r 19 of the Rules of the F High Court 1980 ('the RHC') or under its inherent jurisdiction but this was dismissed on 12 August 1995. Hence this appeal.

The appellant's grounds were that by bringing the fourth action, it was an abuse of the process of the court, was scandalous, frivolous or vexatious, and was prejudicial and embarrassing. G

Learned counsel for the appellant had with his customary eloquence argued that what the respondent was seeking to do was to set aside the order for sale in the second action granted on 16 July 1987 on the alleged basis that the liability for interest imposed by it is not sanctioned by the charge agreement. In that connection, the respondent contends that by H doing so, the appellant had perpetrated fraud against them.

Learned counsel observed that this was the second attempt by the respondent to set aside the relevant order for sale. And, he added, this was despite the relevant order for sale being obtained after an inter partes hearing, the Supreme Court dismissing the appeal against that order and I a similar application, in the third action, being dismissed by the High Court after an inter partes hearing.

To support his argument that the action was an abuse of process, he had referred to s 257(1)(c) of the National Land Code 1965 which requires the order for sale to specify the total amount due to the chargee

at the date on which the order is made. Order 83 r 3 of the RHC provides for the filing of an affidavit and para (6) thereof states that where the plaintiff claims payment of money secured by the charge, the affidavit must prove that the money is due and payable and the particulars mentioned in para (3) thereof must be given, namely the amount of the advances, the amount of the repayments, the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit, and the amount remaining due under the charge. Paragraph (7) of r 3 of the same Order states that where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest.

Accordingly, the amount claimed by the appellant in the charge action in which interest is levied has to be deposed to on affidavit. All other relevant documents, namely the statutory notice, the originating summons, the affidavit in support and the affidavit filed under O 83 of the RHC had raised and sought the interest. This was, therefore, a material issue in the course of the charge action and the respondent should have stated their stand then or at the appeal which they subsequently withdrew.

Learned counsel for the respondent, with his usual candour, remarked that they were not the solicitors in charge when the order for sale and when the withdrawal of the appeal in the second action took place. He reiterated that none of the issues now submitted were raised then and the third action had nothing to do with the issue they were raising now for the first time which was unjust enrichment. In that earlier action, he stressed, the action was for damages for fraud and other grounds, different from the one raised now, and one of the remedies was to set aside the order for sale.

He argued that res judicata is only as regards cause of action estoppel, not remedy estoppel as an order for sale is not a judgment as decided in *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 and since this was an application under O 18 r 19 of the RHC, he added, as long as the respondent can show an arguable case, the action should remain. He also submitted that the order for sale had since been stayed.

He had cited para 73 of the judgment of the Federal Court in *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 at p 113 which was actually an extract of the judgment from the Australian case of *Brisbane City Council & Anor v A-G for Queensland* [1978] 3 All ER 30; [1979] AC 411. Wan Sulaiman FJ had said:

> The defence of res judicata was considered and disposed of at p 425 [of *Brisbane City Council & Anor v A-G for Queensland* [1979] AC 411], and we cite:
>
> > 'The second defence is one of res judicata. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram VC in *Henderson v Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v Commissioner of Taxation* [1926] AC 155. A recent application of it is to

be found in the decision of the Board in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. It was, in the judgment of the Board, there described in these words:

> "... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings."

This reference to "abuse of process" had previously been made in *Greenhalgh v Mallard* [1947] 2 All ER 255 per Somervell LJ and their Lordships endorse it. This is the true basis of the doctrine and it ought to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut from bringing forward a genuine subject of litigation.

In their Lordships' opinion there is no room for application of this doctrine here.'

Learned counsel had also quoted a passage from *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105 at p 117H–I which states:

> It is well settled law that the exercise of such a discretion will be interfered with by an appellate court only in exceptional circumstances; for example, where it has been demonstrated that the decision of the judge below is shown to have depended on an erroneous basis of law or fact or where no reasonable explanation is open save that the decision depended on an erroneous basis of law or fact. More particularly, the fact that we as an appellate court might have exercised the discretion differently is beside the point and will not therefore constitute a sufficient ground for overturning the judge's decision to grant the limited stay.

In reply, learned counsel for the appellant likened a situation where a client sues a solicitor for negligence. There are two causes of action, he said, in contract and in tort. What if the client sues the solicitor in contract and the action is dismissed. Can he file another action on the same facts in tort? Similarly here, he pointed out, the grounds in the fourth action to set aside the order for sale may be different but this cause of action could have been framed in the third action.

He relied on *C (A Minor) v Hackney London Borough Council* [1996] 1 WLR 789 at pp 792 and 793 where Simon Brown LJ said:

> Before turning to consider these reasons and counsel's arguments upon the appeal, it is convenient first to indicate something of the law governing this issue. From the several authorities referred to during the course of argument, I derive these central principles:
>
> (1) The considerations of public policy underlying the plea of res judicata are enshrined in two Latin maxims, *nemo debet bis vexari pro una et eadem causa* and *interest reipublicae ut sit finis litium.*
>
> (2) The plea of res judicata encompasses two distinct forms of estoppel: cause of action estoppel and issue estoppel.
>
> (3) 'Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case, the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such

as to justify setting aside the earlier judgment': see *Arnold v National Westminster Bank Plc* [1991] AC 93 at p 104.

(4) Issue estoppel represents an extension of the doctrine of res judicata to include a bar on the subsequent litigation not only of all decided issues whose resolution was essential to the determination of earlier proceedings but also 'to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time': see *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 at p 643, per Diplock LJ, quoting from *Henderson v Henderson* [1843] 3 Hare 100 at p 115. As Lord Keith of Kinkel put it in *Arnold v National Westminster Bank Plc* [1991] 2 AC 93, 106:

> 'Issue estoppel, too, has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier.'

(5) 'The point' which might have been but was not raised in the earlier proceedings may itself be a cause of action. In *Talbot v Berkshire County Council* [1994] QB 290 at p 301, Mann LJ spoke of the rule as 'a salutary one,' observing that 'it prevents prolixity in litigation and encourages the earliest resolution of disputes'.

(6) In issue estoppel cases, the plea of res judicata will not be applied where to do so would cause injustice. The 'special circumstance' (the phrase used in several of the authorities) justifying the non-application of the rule ordinarily arise where further material becomes available which could not by reasonable diligence have been adduced in the earlier proceedings, or where (as in *Arnold v National Westminster Bank Plc* [1991] 2 AC 93) there has been a change or changed perception of the law.

(7) The plea of res judicata applies only where the cause of action or issue was and remains between the same parties or their predecessors in title. The single exception to this rule is to be found in the Privy Council decision in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, where the party held estopped in the subsequent proceedings had not itself been a party to the earlier action. It was, however, a closely related company with common directors and shareholders.

Learned counsel also referred to the latest Malaysian authority on this point. In *Low Lee Lian v Ban Hin Lee Bank* [1977] 1 MLJ 77, it was propounded at p 92 that:

> When properly understood, there is therefore nothing in the decision in *Kandiah* that permits a chargor in a subsequent action to set aside an order for sale granted by the court inter partes. That may not be done in the absence of an allegation of fraud in the procurement of the order. See *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143. If a chargor is unhappy with an order for sale made inter partes, his only remedy is to appeal against it as has been done in the present case. All that *Kandiah* decides is that the making of an order for sale does not bar an action in personam between the same parties.

Learned counsel for the respondent submitted that *Low*'s case contradicted O 83 r 3 of the RHC. He said there were special circumstances here, citing

Richland Trade & Development Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1996] 4 MLJ 233 as a case on point.

We agree that a person cannot be shut out from bringing an action and would like to reproduce an extract of Lord Kilbrandon's speech in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581 at pp 590 and 591 where he said:

> But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram VC in *Henderson v Henderson* [1843] 3 Hare 100 at p 115 where the judge says:
>
> > '... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'
>
> The shutting out of a 'subject of litigation' — a power which no court should exercise but after a scrupulous examination of all the circumstances — is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule. For example, if it had been suggested that when the counterclaim in No 969 came to be answered Mr Lai was unaware, and could not reasonably have been expected to be aware, of the circumstances attending the sale to Choi Kee, it may be that the present plea against him would not have been maintainable. But no such averment has been made.
>
> The Vice-Chancellor's phrase 'every point which properly belonged to the subject of litigation' was expanded in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 by Somervell LJ:
>
> > '... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.'
>
> Again, a phrase used by Lord Shaw of Dunfermline in delivering the opinion of the Board in *Hoystead v Commissioner of Taxation* [1926] AC 155 at p 171, 'the present point was one which, if taken, went to the root of the matter on the prior occasion', appears precisely apposite to the failure, in answer to the counterclaim in No 969, to raise the matters founded on in No 534 which, if then substantiated, would have been then decisive. An instance of a hard case in which the rule was applied is *Re Koenigsberg* [1948] Ch 727.

A Their Lordships are, accordingly, of opinion that the Full Court was right in ordering that the statement of claim in No 534 be struck out as an abuse of the process of the court; they will therefore humbly advise Her Majesty that the appeal be dismissed with costs.

We were also aware of the finding in *Brisbane City Council and Myer* B *Shopping Centres Pty Ltd v A-G for Queensland (at the relation of Arthur Thomas Scurr and William Percival Boon)* [1979] AC 411 where it was held in dismissing the appeal:

(3) That the basis of the defence of res judicata in its wider sense, by which a party was precluded from raising an issue which he could and should C have raised in earlier proceedings, was that to raise such an issue was an abuse of process and that (even assuming that in the present case the existence of the trust was known at the time of the earlier proceedings and that there was the necessary identity of parties), since it would have been inappropriate to assert the existence of the trust either in the planning consent appeals or in the 1971 action against the council, the D bringing of the present action was not an abuse of process and the defence failed.

In the present proceedings, it is our considered view that the proper forum for the respondent to raise the issue on the interest payable was before the judge who granted the order for sale in the second action. This they did not do.

E Subsequently, they had the golden opportunity to canvass the same point at the appeal level. Instead, they chose to withdraw the appeal depriving them of their right to raise the same point. Again, in the third action, they did not raise this although the prayer there was also to set aside the order for sale as in the fourth action albeit on different grounds.

F Although the Supreme Court decision in *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 is to the effect that the doctrine of res judicata would not apply where the previous proceedings were only charge actions which did not result in a final judgment or order, as has been pointed out earlier, a clarification had been made on this point by the Federal Court in G *Low Lee Lian v Ban Hin Lee Bank* [1997] 1 MLJ 77.

In any case, in *Kandiah Peter*'s case, the chargor was not seeking to impeach the earlier order for sale but was only seeking to challenge the validity of the charge documents and the subsequent civil proceedings in which the doctrine was raised was the first after the order for sale. Here, H it is the second, as the first was the third action where there was the similar prayer to set aside the order for sale in the second action as in the fourth action. Surely and certainly, the doctrine of res judicata would apply here as both the third and the fourth actions seek the same basic remedy and we consider that the respondent should have raised the issue in the third action and not in the fourth action as they had done. Accordingly, the I respondent should be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings as per the Supreme Court decision in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 whilst approving the decision reached in *Brisbane City Council*'s case.

In Spencer Bower and Turner's *The Doctrine of Res Judicata* (2nd Ed) at Ch 11 at p 20, it is stated as follows: A

Introduction

21 A res judicata is a judicial decision, pronounced by a judicial tribunal. It is of no avail to prove that the alleged res judicata was a decision, or even that it was a judicial one, in the sense that it was pronounced according to judicial principles, unless it be also established that it emanated from a judicial tribunal in the exercise of its judicial functions; nor, on the other hand, is it sufficient to shew that it was pronounced by a judicial tribunal, unless it be also shewn that it was a decision, and a judicial one, as distinguished from a termination of the proceedings otherwise than by a judicial decision. It is vital, therefore, to the present inquiry to fix at the outset the proper definition, first, of 'judicial tribunal', and then, of 'judicial decision.' B C

And at pp 29 and 30 of the same text, it is stated:

What is a judicial decision? D

30 In order to establish a res judicata on which an estoppel may be founded, it must appear, not only that the person, or body of persons, pronouncing the deliverance constituted a judicial tribunal, but also that what was pronounced amounted to a judicial decision. There must have been both a *judex*, and *a judicium*, *Bradshaw v M'Mullan* [1920] 2 IR 412 (HL) per Lord Shaw at pp 424 and 425 which, for purposes of estoppel, means a *decision* or determination or adjudication of some question of law or fact, whether such decision takes the form of an express judicial declaration, or is necessarily involved in the command or prohibition which constitutes the judgment or judicial act in its coercive or operative aspect. Everything which answers to this description, by whatever name it may be called (for different phraseology in this respect has been adopted by different tribunals, or by the same tribunal, at different stages in the history of our jurisprudence) is deemed a judicial decision; and nothing which falls short of it (again, irrespective of nomenclature) is so deemed. E F

In our present circumstances, considering the sequence of events, especially when there was no appeal against the decision in the third action, the respondent could and should have brought this objection against additional interest in the third action. In any case, it is our finding that they can sue the appellant direct without having to set aside the order for sale. G

As stated earlier, the appeal is allowed with costs here and below and the deposit refunded to the appellant. H

Appeal allowed.

Reported by RS Raja

I